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No. 07-1064

In The
Supreme Court of the United States

ESTATE OF ELEANOR R. GERSON, DECEASED,
ALLAN D. KLEINMAN, EXECUTOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE* THE ESTATE OF LOUISE BLYTH TIMKEN, ET AL., IN SUPPORT OF PETITIONER

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March 20, 2008

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court, the Timken Family *Amicus Curiae*, who are specifically identified below respectfully move this Court for leave to file the accompanying brief *Amicus Curiae* in support of the Petition for Writ of Certiorari submitted by Petitioner, Estate of Eleanor R. Gerson, deceased, Allan D. Kleinman, Executor. The consent of the attorneys for Respondent was requested and obtained. The consent of the attorneys for Petitioner was requested but was not provided, which necessitates the filing of this motion.

The *amicus curiae* for this motion and brief are as follows:

1. Estate of Louise Blyth Timken;

2. Ward J. Timken and Joy A. Timken*, Co-Executors of the Estate of Louise Blyth Timken;

3. Henry H. Timken, Jr. Trust Fund A;

4. Henry H. Timken, Jr. Trust, Fund A1A fbo Alexander C. Timken;

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* Joy A. Timken was substituted for W. R. Timken, Jr., who resigned as Co-Executor during the pendency of this case when he was appointed United States Ambassador to the Federal Republic of Germany by President George W. Bush.

5. Henry H. Timken, Jr. Trust, Fund A1B fbo Peter T. Toot;

6. Henry H. Timken, Jr. Trust, Fund A1C fbo Elizabeth Burnham Timken;

7. Henry H. Timken, Jr. Trust, Fund A2A fbo Susan M. Matthews;

8. Henry H. Timken, Jr. Trust, Fund A2B fbo Thomas Wesley Matthews;

9. Henry H. Timken, Jr. Trust, Fund A2C fbo Anna Virginie Corwin Timken;

10. Henry H. Timken, Jr. Trust, Fund A2D fbo Nicholas Timken;

11. Henry H. Timken, Jr. Trust, Fund A2E fbo John Henry Timken; and

12. Henry H. Timken, Jr. Trust, Fund A2F fbo Stuart Morgan Timken.

(Collectively referred to hereafter as "Timken Family *Amicus Curiae*").

The *Amicus Curiae* have a substantial interest in the outcome of the appeal of this case because they have a tax refund case pending in the United States District Court for the Northern District of Ohio, Case No. 5:04CV1188, in which the predecessor Treasury Regulation in issue in this case is sought to be invalidated. The *Amicus Curiae* seek a refund of $4,077,252.80 in generation skipping transfer tax

("GST tax") plus statutory interest. Like Petitioner here, the *Amicus Curiae* believe they qualify for exemption from the GST tax because of the grandfather provision of Section 1433(b)(2)(A) of the Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2731. Like the case here, Respondent claims that its Treasury Regulation promulgated in relation to the grandfather provision of the statute trumps that statute and precludes the exemption. The decision of this case may be determinative of the outcome of the tax refund case filed by the *Amicus Curiae*. *Amicus Curiae* were allowed to participate as *amicus curiae* in the Sixth Circuit. *Amicus Curiae* believe that it would be useful and helpful to the Court if they have an opportunity to submit their views on the grandfather provision and the related Treasury Regulation, §26.2601-1(b)(1)(i).

The Petition presents issues which have national implications concerning the applicability of the GST tax. The Petitioner, *Amicus Curiae*, and other taxpayers throughout the Country will be directly affected by the threshold determination as to whether the grandfather clause exempts them from the GST tax or not. The split in four Circuit Courts and in the U.S. Tax Court itself shows how controversial and important the issues really are which cry out for resolution by the Court once and for all. Where a federal tax law is interpreted and applied differently from Circuit to Circuit, an intolerable situation for all taxpayers and the Government is created: some taxpayers pay the substantial GST tax while others in the same position pay nothing. Where there are such disparate results affecting taxpayers throughout the land, the Court will be well served to have as many

responsible views on the issues as possible before it when it makes its decision about whether or not to take the case.

For the above reasons, the Timken Family *Amicus Curiae* respectfully request that their Motion for Leave to File the attached Brief of *Amicus Curiae* be granted.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

The Timken Family *Amicus Curiae* are composed of a decedent's estate, the co-executors of that estate and various trusts who are all directly affected by this case. Like Petitioner here, the *Amicus Curiae* believe they qualify for exemption from the generation skipping transfer tax ("GST tax") because of the grandfather provision of §1433(b)(2)(A) of the Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2731. The *Amicus Curiae* seek a refund of $4,077,252.80 in GST tax plus statutory interest in a tax refund case pending in the United States District Court for the Northern District of Ohio, Case No. 5:04-CV-1188. In that case, the *Amicus Curiae* seek, *inter alia*, the invalidation of the predecessor Treasury Regulation in issue in this case.

SUMMARY OF ARGUMENT

The *Amicus Curiae* believe that the petition for writ of certiorari should be granted for the following reasons. First, the case presents a very important issue concerning the applicability of the generation skipping transfer tax ("GST tax"), which is a tax that has not been previously addressed by the Court. Second, there has been a failure by the Sixth Circuit below to follow the appropriate decisional rules for statutory interpretation established by this Court,

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel for *Amicus Curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or the submission of this brief.

which failure warrants the attention of this Court. Third, the Sixth Circuit's decision below exacerbates a conflict which exists in the Circuits on the grandfather provision of the GST tax. A taxpayer is exempt from the GST tax in the Eighth and Ninth Circuits, but loses in the Second and Sixth Circuits. This creates disparate treatment for similarly situated taxpayers where there should and must be uniformity. Fourth, the Treasury Department cannot be allowed to overrule Congressional legislation by regulatory fiat; the regulation in issue usurps the role of Congress in determining what to tax. Finally, this case presents a good opportunity for the Court to aid the analytic process set out in *Chevron* to provide specific guidance to courts and practitioners in determining what language and words are or are not ambiguous so that the Tax Court, District Courts and Circuit Courts can consistently apply the tests and come to similar results. Any one of these arguments by itself is sufficient grounds for granting the petition, and together create an overwhelming and compelling case for granting the petition and accepting the case for a hearing on the merits.

ARGUMENT

I. The Case Presents a Very Important Issue for the Administration of the Generation Skipping Transfer Tax.

The Sixth Circuit upheld a Treasury Regulation that was promulgated in relation to an uncodified grandfather clause enacted as part of the Tax Reform Act of 1986, Pub. L. No. 99-514, §1433(b)(2)(A), 100 Stats. 2717, 2731. That law, among other things,

provided for the imposition of a generation skipping transfer tax ("GST tax"), but also included an effective date provision or grandfather clause that provided that any generation skipping transfer under a trust which was irrevocable on September 25, 1985, would not be subject to the tax, but only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985. Thus, Congress provided a broad and simple grandfather provision that carves out from the reach of the GST tax various and numerous generation skipping transfers that would otherwise be subject to the tax. Congress specifically provided that only two statutory requirements had to be met in order to qualify for exclusion from the GST tax under the grandfather provision. One is that the transfer be made under a trust which was irrevocable on September 25, 1985. The second is that the transfer in question not be made out of corpus added to the trust after September 25, 1985.

In the face of such simplicity, the Treasury Department promulgated a series of ever-complex and sweeping regulations that had the net effect of completely overriding the Congressional purpose in providing the broadly-worded grandfather provision for all trusts containing a general power of appointment.

The Treasury Department took the simple grandfather provision and added one caveat and condition after another through a series of regulations until nothing can fall outside of the GST taxing scheme, including the transfers which occurred in this case and in other cases. This interpretation and

approach embodied in the regulation finds no support in the statutory text.

Any Treasury Regulation must fail or be held invalid if it takes away a benefit explicitly conferred by Congress and/or imposes a restriction to a taxing statute which is not contained in the statute. *United States v. Calamaro*, 354 U.S. 351, 354, 77 S. Ct. 1138, 1 L. Ed.2d 1394 (1957) ("*Calamaro*") ("[W]e cannot but regard this Treasury Regulation as no more than an attempted addition to the statute of something which is not there"). The Treasury cannot impose a tax by regulation, which is exactly what is being intended by the regulation in issue. See also *Commissioner v. Acker*, 361 U.S. 87, 80 S. Ct. 144, 4 L. Ed.2d 127 (1959); *Koshland v. Helvering*, 298 U.S. 441, 443 (1936). As succinctly stated in *National Life and Accident Ins. Co. v. United States*, 524 F.2d 559, 560 (6th Cir. 1975):

> An income tax regulation cannot take away a benefit conferred by the Internal Revenue Code. ...Nor may the Commissioner add a restriction to the statute which is not contained in the statute...
>
> The Courts and the Commissioner do not have the power to repeal or amend the enactments of the legislature even though they may disagree with the result; rather it is their function to give the natural and plain meaning effect to statutes as passed by Congress. (citations omitted.)

A treasury regulation should not be sustained if it is unreasonable and plainly inconsistent with the

revenue statute. *United States v. Cartwright*, 411 U.S. 546, 93 S. Ct. 1713, 36 L. Ed.2d 528 (1973) (invalidating Treasury Regulation on valuation of mutual fund shares). See also *Commissioner v. Acker*, *infra* at p.4, where the Court affirmed the invalidation of an estimated tax penalty regulation because it was unreasonable and plainly inconsistent with the statute.

II. This Case Presents a Situation of a Failure by the Sixth Circuit to Follow the Appropriate Decisional Rules for Statutory Interpretation and Administrative Regulations.

The Court says the plain language of a tax statute controls. In *Gitlitz v. Commissioner*, 531 U.S. 206, 212 S. Ct. 701, 148 L. Ed.2d 613 (2001), the Court rejected the IRS policy concern about an alleged double windfall that apparently was going to be realized by the taxpayers because "the code's plain text permits the taxpayers here to receive these benefits." This is in keeping with a fundamental rule of statutory construction, which is that "where...the statute's language is plain, the sole function of the courts is to enforce it according to its terms." See *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 239, 109 S. Ct. 1026, 103 L. Ed.2d 290 (1989) ("*Ron Pair*") ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."); *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 295, 115 S. Ct. 2144, 132 L. Ed.2d 226 (1985) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most

extraordinary circumstance, is finished"); *Yates v. Hendon*, 541 U.S. 1, 124 S. Ct. 1330, 158 L. Ed.2d 40 (2004) ("because the statute's text is adequately informative, we need not look outside ERISA itself"). Over and over in *Gitlitz*, the Court resorted to "the plain language of the statute" to determine the complex issues presented related to Internal Revenue Code Sections 108 and 1366 and rejected the IRS positions including its reliance upon a Treasury Regulation.

In this regard, the present case is strikingly similar to *Iselin v. United States*, 270 U.S. 245, 46 S. Ct. 248, 70 L. Ed. 566 (1926) ("*Iselin*"), which is another case in which the IRS attempted to change the scope of a plainly worded tax statute by reading in language that Congress, according to the IRS, had inadvertently omitted. In *Iselin*, as in the present case, the plain language of the tax statute appeared to exempt from taxation a particular transaction (sales of certain theater tickets). As in the present case, the IRS argued that despite the plain language of the statute, "Congress clearly intended to tax all sales of tickets" and that this general purpose of Congress should be given effect so as to reach all cases within the general scope of the legislation. The Court summarily rejected the IRS's attempt to change the plain meaning of the statute and held that the ticket sales were exempted from the tax. The Court stated, *supra* at 251:

> [The statute's] language is plain and unambiguous. What the Government asks is not a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may

> be included within its scope. To supply omissions transcends the judicial function.[2]

In the present case, the Respondent invites this Court to do what the Court in *Iselin* rejected - to validate a Treasury Department change to the plain meaning of §1433(b)(2)(A) by reading additional language and requirements into the statute. As stated in *Iselin*, this kind of act "transcends the judicial function" and is, therefore, erroneous and impermissible. See also *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 102 S. Ct. 821, 70 L. Ed.2d 792 (1982) ("*Vogel*") (invalidating tax regulation); and *Calamaro*, *infra* at p.4, which disregarded a Treasury Regulation which represented an attempted addition to the wagering tax statute.

Applying the above principles, the Treasury Regulation in issue here should be invalidated. First, Congress has directly spoken to the precise question in this case with clear language and intent. In §1433(b)(2)(A), Congress specifically stated that irrevocable trusts are exempt from the reach of the GST tax provided the trust was irrevocable prior to September 25, 1985, and nothing was added to the corpus of the trust thereafter. The teaching of the above cases is that we should start from the basic premise that Congress meant what it wrote into law. There was no suggestion that the existence of a

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[2] This very passage and fundamental analysis was cited approvingly by the Court in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 92, 111 S. Ct. 1138, 113 L. Ed.2d 68 (1991).

general power of appointment within the trust would or should make a difference, or that the release, exercise or lapse of a general power would or should make a difference on whether the trust is exempt from the GST tax. The grandfather clause was broadly drawn and carries none of the baggage or restrictions that the IRS would like to engraft upon the law in the Treasury Regulation at issue here ("the Regulation"). Because the broad intent of Congress is clear and unambiguous, there is no basis to validate the Regulation. In accord, *Simpson v. United States*, 183 F.3d 812, 813 (8th Cir. 1999) (finding the language of the grandfather provision to be plain); and *Bachler v. United States*, 281 F.3d 1078 (9th Cir. 2002) (also finding the grandfather provision to be clear and straightforward).

Second, the Regulation is not a reasonable interpretation of §1433(b)(2)(A). In determining whether an interpretive regulation implements the congressional mandate in some reasonable manner, this Court should look to see whether the regulation is harmonious with the plain language of the statute, its origin, and its purpose. *Rowan Cos. v. United States*, 452 U.S. 247, 253, 101 S. Ct. 2288, 68 L. Ed.2d 814 (1981) ("*Rowan*").

In undertaking this kind of analysis, the statutory language is paramount. It is clear that Congress intended to generally except from the reach of the then new GST tax any and all pre-existing irrevocable

trusts.[3] The reason for this is plain: because the original grantors (living or dead) could do nothing to change the provisions of the irrevocable trust to avoid the otherwise unfair impact of the GST tax. The essence of an irrevocable trust is that no modifications of existing trust provisions can be made to take account of future events, including the passage of a tax act. In order to eliminate the otherwise unfair impact of the GST tax upon those irrevocable trusts, Congress provided the general exception of the effective date rule. The only exception made to the general exception of a trust that was irrevocable before September 25, 1985, is only to the extent that transfers are attributable to additions to the trust corpus occurring after that date. Of course, this was intended to prevent stuffing an irrevocable trust with additional assets once it was realized that it could otherwise be used as a Congressionally sanctioned method to pass assets to skip persons without being subject to the GST tax. That sensible and fair result, which is consistent with the plain meaning of the words, is the only allowable restriction that could be read into the grandfather clause.

The Regulation here removes from the protection of the effective date rule any trust subject to or including a general power of appointment, even though the trust was irrevocable on September 25, 1985, and no addition to corpus had been made to it after that date.

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[3] Direct skips like those involved here were not covered by the 1976 Tax Reform Act version of the GST tax and were not made subject to that tax for the first time until the Tax Reform Act of 1986.

In taking this position, the IRS has added major restrictions to the grandfather clause which Congress did not impose. This added restriction is an unreasonable statutory interpretation which does not harmonize with the plain language of the statute, its origin, and its purpose. Accordingly, the Regulation is invalid, and the grandfather clause excepts the Estate here from the GST tax.

The words of the statute are plain words, which should be given their normal meaning. The Court stated in *Burlington N.R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461, 107 S. Ct. 1855, 95 L. Ed.2d 404 (1987):

> ...the language of the statute itself must ordinarily be regarded as conclusive. ...Unless exceptional circumstances dictate otherwise, when we find the terms of a statute unambiguous, judicial inquiry is complete.

Here, as in *Burlington*, the statutory language is unambiguous. There is nothing that suggests that trusts containing a general power of appointment should not be exempt under the grandfather provision. Driving even deeper into the Regulation, there is nothing to support the constructive addition concept. Webster's New International Dictionary of the English Language (3rd Ed. 1963) defines the term "add" as to "join or unite so as to increase the number, augment the quantity." Under no common understanding of the word can added be given the construction provided by the Regulation. In accord, *S. D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, fn5, 126 S. Ct. 1843, 164 L. Ed.2d. 625 (2006) ("If one takes

a ladle of soup from a pot ... and pours it back into the pot, one has not 'added' soup or anything else to the pot.") Congress actually uses the word "constructive" when it is intended to apply. See, eg., 26 U.S.C. §§267, 318, 544, 1260, 2056, 2652, 3123, and 4216. Congress ought to be able to reasonably expect that normal language usage applies without having to explain or define every word in a statute.

The IRS has no discretion to impose a tax or increase a taxpayer's tax liability. The IRS is constrained by the laws passed by Congress, who determines who and what is taxed and who and what is exempt. Congress, not the IRS, made a policy decision when it enacted the 1986 Tax Reform Act to not impose the GST tax on irrevocable trusts already in existence. The IRS obviously does not like that decision. But it was Congress' decision to make. It should not matter that the IRS really wants to hammer the trust assets and beneficiaries with a GST tax *in addition* to the confiscatory-like federal estate tax to which they were already subject by IRC §2041. The Regulation is nothing more than an attempt to amend the tax code to achieve a harsh result, where Congress specifically expressed its intent to avoid harsh consequences like this one in plain language.

Unable to tax under the plain language of the statute, the Treasury attempts to circumvent this statute by promulgating and then citing to its own make-weight regulations reinterpreting and drastically changing the meaning of the congressionally-created grandfather clause. Under the regulations, the existence and exercise (or lapse) of a power of appointment never mentioned in the

grandfather clause, not the date the trust became irrevocable, becomes critical to application of the GST tax. The Treasury strategy of continually changing the Regulation reveals its own lack of confidence in its reading of the plain statutory language. Moreover, it is just plain unfair and unlawful for an agency like the Treasury to promulgate and invoke a regulation that bears no resemblance to the statutory language to win litigation. In its eagerness to tax, the Treasury supplants the role of both Congress and the courts.

The Regulation makes the effective date statute a nullity for all general power of appointment marital deduction trusts, which were the most common tools for garden-variety marital estate planning prior to 1983 and which remain commonly used devices for many reasons, including tax reasons. Richard Nenno, Esq., *Gerson v. Com.: Donees of General Powers of Appointment Over Grandfather Trusts Unite* in 32 TAX MGMT. EST., GIFT TR. J., 131, 134 (2007) ("Nenno article") ("After all, until 1982, virtually all marital deduction trusts were established under §2056(b)(5), which *requires* the surviving spouse to have such a power.") (Emphasis added.) None could qualify for relief under the effective date statute if a general power of appointment exists with respect to the assets. Courts cannot allow a construction of a statute by regulation or otherwise that, in effect, renders it a nullity. *United States v. Larionoff*, 431 U.S. 864, 872, 97 S. Ct. 2150, 53 L. Ed.2d. 48 (1977). See also *Knight v. Commissioner*, 552 U.S. ____, 128 S. Ct. 782 (2008) ("...accepting the...approach would render part of the statute entirely superfluous, something we are loath to do.") It is simply impermissible to make and promulgate such a regulation. It is perfectly clear that

Congress could have withheld the exception from those existing trusts, but it did not, and it did not grant the Treasury Department any discretion to concoct and add a strained and strange meaning to the phrase "generation-skipping transfer under a trust" and the word "added" (or the phrase "corpus added to the trust") in order to reach the result Treasury wants.

Congress has been especially precise, meticulous and very explicit regarding the estate and gift tax consequences of the lapse, release, and exercise of general powers of appointment ever since the estate and gift tax laws were first enacted. Had Congress actually intended that those events cause ineligibility for the irrevocable trust effective date exception, its consistent practice would have caused it to create specific language with the provision. The absence of such language in the irrevocable trust exception, or even a hint of it, is very strong evidence that Congress had no such intent or expectation. For example, Congress could have added the following language to §1433(b)(2)(A): "provided, however, this exception shall not apply to any generation-skipping transfer resulting from a release, exercise, or lapse of a general power of appointment after September 25, 1985." Congress did not add such language to the statute. Cf. examples of such an approach in *Ron Pair*, *infra* at p.6, fns. 4 & 5. Thus, the Treasury had no power or authority to introduce that concept into regulations pertaining to the effective date statute so as to render it a nullity.

III. The Conflict in the Circuits on the Issue Here Creates an Intolerable Situation That Can Only be Corrected by The Court.

A conflict presently exists in the Circuits on the issue raised in this case. If a taxpayer is fortunate enough to be in the Eighth or Ninth Circuits, they will win. But if the taxpayer is unfortunate enough to be in the Second or Sixth Circuits, they will probably lose. Compare *Simpson v. United States*, 183 F.3d 812 (8th Cir. 1999), and *Bachler v. United States*, 281 F.3d 1078 (9th Cir. 2002). with *Estate of Eleanor R. Gerson v. Commissioner*, 507 F. 3d 435 (6th Cir. 2007), and *E. Norman Peterson Marital Trust v. Commissioner*, 78 F.3d 795 (2nd Cir. 1996). No one knows how the other Circuits would rule on the issue. The Sixth Circuit in its opinion below explicitly recognizes the fact that this conflict exists:

> The parties' dispute on this second clause brings to this court a question that divides three of our sister circuits and the Tax Court below. (Citations omitted.) *Gerson*, *supra* at 438.

A dichotomy presently exists where there should and must be uniformity in taxation. Furthermore, the deep division within the United States Tax Court as evidenced by the multiple dissenting and concurrent opinions on the precise issue presented by this case, found at 127 T.C. 139, is a further indication of the seriousness of the conflict and that the issue presented here can be considered a close, interesting, and challenging question worthy of the Court's review under Rule 10(a) of the Supreme Court Rules. The issues raised by this case have also drawn some

scholarly attention. See, eg., Nenno article, *infra* at p. 13.

IV. The Treasury Department and The IRS Cannot be Permitted to Override Congressional Legislation by Regulatory Fiat.

The Congress provided a plain and simple exception to the application of the GST tax in the grandfather provision. By promulgating a regulation which totally overrides the grandfather provision, the Treasury has usurped the role of Congress in determining what to tax. Clearly, the Court must reject the Treasury's attempt to overrule the Congressional legislation and see that it is given its proper force and effect as intended by Congress in the clear and plain language that it used in enacting the grandfather clause.

V. Treasury Regulation §26.2601-1(b)(1)(v) is not a Valid Regulation.

In determining the validity of a regulation, it is important to determine whether the regulation is a legislative regulation, which flows from a specific congressional grant of authority, or an interpretive regulation which does not. A legislative regulation can only be set aside by a Court if it is arbitrary, capricious, or manifestly contrary to the statute. In contrast, an interpretive regulation is upheld only if it harmonizes with the plain language of the statute, its origin, and its purpose. *Rowan, infra* at p.9.

There is no dispute that the regulation relied upon by Respondent here is an interpretive regulation. *Peterson*, *supra* 78 F.3d at 798. The authority for the regulation is derived solely from the interpretive authority under Internal Revenue Code §7805(a), which is "more circumscribed." *Vogel*, *infra* at p.8.

Chevron U.S.A., Inc. v. National Resource Defense Counsel, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984) ("*Chevron*"), is generally considered as setting forth the extent to which a court should accord deference to an agency interpretation of a statutory term, including an interpretative regulation promulgated under the Internal Revenue Code §7805(a). *Chevron* held that:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court has determined that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as it would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Supra* at 842-3.

When a court is faced with an interpretive regulation promulgated under Code §7805(a), the interpretation is entitled to less deference than a legislative regulation. *Rowan, infra* at p.9; *Vogel, infra* at p.8.

The answers to both *Chevron* questions favor petitioner here.

First, Congress has directly spoken to the precise question in this case with clear language and intent. Congress intended all irrevocable trusts to be exempt from the reach of the GST tax provided that the trust was irrevocable prior to September 25, 1985, and nothing was added to the corpus of the trust thereafter. There was no suggestion that the existence of a general power of appointment would make a difference, or that the release, exercise, or lapse of a general power would make a difference. There is no mention in words or by implication of any legal fiction about whether an irrevocable trust could contain a general power or not. Either way, such a trust would qualify for the grandfather clause because no such qualification is contained within the grandfather clause. The grandfather clause was broadly drawn and carries none of the baggage the IRS would like to engraft upon the law. Because the broad language used by Congress is clear and unambiguous, there is no basis to validate the regulation under *Chevron*.

Second, the Regulation is not a reasonable construction of the grandfather clause. In determining whether an interpretive regulation implements the Congressional mandate in some reasonable manner, the Court should look to see whether the Regulation is harmonious with the plain language of the statute, its

origin, and purpose. In undertaking this kind of analysis the statutory language is paramount. It is clear that Congress intended to generally exempt from the reach of the then new GST tax all pre-existing irrevocable trusts. The reason is plain: because the grantors could do nothing to change or avoid the impact of the GST tax because their trusts were irrevocable. By definition, the essence of an irrevocable trust is that no changes could be made to take account of future events such as the passage of a tax act. In order to limit the harsh impact of the GST tax upon such trusts Congress provided the general exception of the grandfather clause.

Respondent in its regulation would remove from the protection of the grandfather clause any trust subject to a general power of appointment, even if the trust was irrevocable on September 25, 1985, and no addition has been made to corpus after that date. Taking this position, Respondent has added major restrictions to the grandfather clause which Congress did not impose. These added restrictions are an unreasonable statutory interpretation which do not harmonize with the plain language of the statute, its origin, and its purpose. Regulations can carry out the purposes of an act, not amend it. *Miller v. United States*, 294 U.S. 435, 438, 55 S. Ct. 440, 79 L. Ed.2d 977 (1935). Accordingly, the Regulation is invalid, and the grandfather clause excepts the transfers at issue here from the GST tax.

The fact that Mr. Gerson gave Mrs. Gerson a general power of appointment makes no difference. He obviously gave her the power in order to qualify his trust for the estate tax marital deduction which then

was very conventional estate planning. See Nenno article, p. 134. Congress did not write the broad grandfather clause unmindful of the norm for trusts.

VI. The Lower Courts Need the Court's Guidance to Determine When A Statute Is Ambiguous.

This case presents a perfect illustration of how the lower courts are in need of guidance to determine when a statute is ambiguous permitting administrative interpretation by regulation. On the one hand, the Eighth and Ninth Circuits say the grandfather clause is plain and unambiguous and the Second and Sixth Circuits say the opposite. The same basic conflict is displayed in the 6 opinions authored by the Tax Court judges in this very case.

CONCLUSION

For all the foregoing reasons, the Timken family *Amicus Curiae* respectly request that the Court grant the petition for writ of certiorari.

Respectfully Submitted,

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